



# The Attorney General of Texas

November 28, 1978

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Mr. Henry D. Akin, Jr.  
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Open Records Decision No. 209

Re: Whether a survey of teachers is public under the Open Records Act.

Dear Mr. Akin:

You have requested our decision as to whether the results of an opinion survey of Richardson Independent School District employees must be made public under the Texas Open Records Act, article 6252-17a, V.T.C.S. The survey was conducted among the 2,799 employees, including teachers, administrators, and custodians, among other job classifications. It consisted of 34 questions. The first 32 asked the employee to indicate whether he agreed, disagreed or had no opinion with regard to the statement in each question reflecting job attitudes. Question 33 asked the job classification held by the employee. Question 34 called for a completion of a phrase with written comments: "RISD would be a better place if \_\_\_\_\_." The surveys were compiled for each school and also compiled for each job classification. The comments were transcribed and the originals destroyed. A request has been made by a member of the public to see the final results.

You contend that this information is exempt from required public disclosure by section 3(a)(11) of the Open Records Act, which excepts from disclosure intra-agency memoranda and letters which would not be available by law to a party other than one in litigation with the agency. We have said that the purpose of this exception is to protect "advice and opinion on policy matters and to encourage open and frank discussions" among members of the agency. Attorney General Opinion H-436 (1974). It is intended to protect the internal deliberative process of the public's decision makers. Open Records Decision No. 192 (1978) (report to the Coordinating Board concerning the certification of a college); Open Records Decision No. 179 (1977) (memo regarding comparable wage standards); Open Records Decision No. 160 (1977) (internal audit by TDMHMR of federal grant program); Open Records Decision No. 149 (1976) (Coordinating Board staff report on proposed medical school); Open Records Decision No. 137 (1976) (evaluation of University of Texas School of Nursing); Open Records Decision No. 117 (1975) (university salary recommendations); Open Records Decision No. 86 (1975) (faculty report

to university president). Factual information which is severable and does not include advice, opinion or recommendation must be disclosed. Attorney General Opinion H-436 (1974).

A federal court construing an identical provision in the federal Freedom of Information Act has said:

It generally has been accepted that exemption five incorporates the governmental privilege, developed in discovery cases, to protect documents containing advisory opinions and recommendations or reflecting deliberations comprising the process by which government policy is formulated. . . . [T]he courts have required disclosure of essentially factual material but allowed agencies to withhold documents which reveal their deliberative or policy-making processes.

. . . [T]he quality of administrative decision-making would be seriously undermined if agencies were forced to "operate in a fishbowl" because the full and frank exchange of ideas on legal or policy matters would be impossible. A decision that certain information falls within exemption five should therefore rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency.

Mead Data Central, Inc. v. U.S. Department of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977).

It is our decision that the verbatim comments solicited in question 34 are more in the nature of opinion, advice and recommendations than they are factual information and, therefore, fall within the exception of the Texas Open Records Act permitting their nondisclosure, although we believe the summaries of the comments should be released. Further, it is our decision that those portions of the report from the consultant which make recommendations are excepted from disclosure under the same exemption. Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Open Records Decision No. 192 (1978).

However, with regard to the questions on the survey calling for an objective response (# 1 - 33) we believe that the final compilation is factual and informational in character and must be disclosed. The results of the survey indicate the percentage of the RISD employees who agree or disagree with given propositions. We think that this is the type of information in which the public has a legitimate interest. Cf. Open Records Decision No. 197 (1978) (test scores of teachers as a group are public); Open Records Decision No. 167 (1977) (student

evaluation of faculty members is public); Open Records Decision No. 81 (1975) (report of citizen complaints of school conditions and operations is public). In Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975) the court held that reports evaluating personnel management were not part of the "deliberative process" and hence not protected from disclosure. The court said that to be exempt

the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take -- of the deliberative process -- by which the decision itself is made.

Id. at 1144.

We believe that the compiled results of the survey

appear to be informational in nature. They provide the raw data upon which decisions can be made; they are not themselves a part of the decisional process.

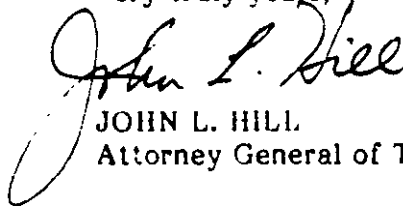
Id. at 1145.

You also contend that sections 3(a)(1) and 3(a)(2) exempt portions of the survey results which contain implicit complaints against identifiable individuals. For example, print outs reporting the responses of personnel at one school comment on the performance of an individual principal, while other portions reporting the survey results of a small work unit reflect on the performance of an identifiable supervisor. We have determined that anonymous student evaluations of named teachers and faculty members are public. Open Records Decisions Nos. 206 (1978); 167 (1977); 34 (1974). The student evaluations, like the survey results you have submitted, were statistical compilations of responses to questions. They were directed solely at the evaluation of individual teachers, while your surveys inquire about working conditions generally and contain relatively few questions on the performance of supervisors. Your surveys are not "documents relating to performance evaluation and recommendations on employment renewal or retention which express personal opinion," which we said were closed to the public in Open Records Decision No. 90 (1975). They are instead comparable to the student evaluation reports, the release of which did not constitute a clearly unwarranted invasion of personal privacy within section 3(a)(2). Open Records Decision No. 167 (1977).

We believe that the individual written comments and portions of consultant's report are closer to the opinion, advice and recommendation aspect of the

deliberative process and thus are excepted from disclosure. The remaining compiled results of the survey must be made public.

Very truly yours,

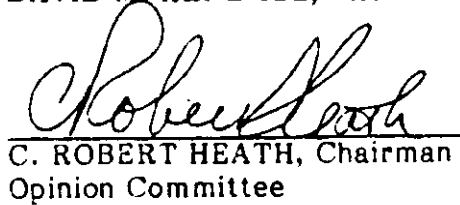


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APPROVED:



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C. ROBERT HEATH, Chairman  
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